

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSE MANUEL PRIETO-ROMERO,

Petitioner,

v.

A. NEIL CLARK, *et. al.*,

Respondents.

Case No. C06-786RSL

ORDER DENYING
MOTION TO DISMISS

I. Introduction

This matter comes before the Court on petitioner Jose Manuel Prieto-Romero's "Petition for a Writ of Habeas Corpus" (Dkt. # 4) and on the Government's motion to dismiss (Dkt. # 15). Petitioner challenges the lawfulness of his continued detention without bond under section 236 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1226. He also argues that his detention violates the Due Process Clause of the United States Constitution. Respondents contend that petitioner is being held under section 241 of the INA, 8 U.S.C. § 1231, and his detention under this provision is lawful.

The Court, having reviewed Prieto-Romero's habeas petition, respondents' motion to dismiss, the Report and Recommendation ("R & R") of United States Magistrate Judge James P. Donohue, petitioner's objection to the R & R, and the remaining record, adopts the R & R's statement of the facts and the R & R's conclusion that petitioner is being held pursuant to INA §

1 236(a). The Court writes a separate order to address petitioner's statutory and constitutional
2 challenges to his continued detention.

3 **II. Background**

4 Petitioner is a native and citizen of Mexico, who has been detained by U.S. Immigration
5 and Customs Enforcement ("ICE") since February 23, 2005. The Board of Immigration Appeals
6 ("BIA") ordered petitioner removed after two hearings before an Immigration Judge ("IJ"), and
7 affirmed the IJ's decision to deny release on bail. Petitioner appealed his removal, which is
8 currently pending before the Ninth Circuit. The official website for the Ninth Circuit Court of
9 Appeals explains that oral arguments are usually scheduled 9-12 months after briefing is
10 completed, and that most final orders are issued between three and twelve months after oral
11 argument.¹ Petitioner's opening brief was due February 12, 2007.² Prieto-Romero v. Gonzales,
12 No. 05-75747 (9th Cir. Nov. 14, 2006).

13 **III. Discussion**

14 Petitioner contends that his two-year detention pursuant to INA § 236 is unlawful under
15 the Supreme Court's decision in Zadvydas v. Davis, 533 U.S. 678 (2001). In Zadvydas, the
16 petitioner challenged his continued detention where removal was impracticable because no
17 country would accept him. The Supreme Court held that INA § 241, which permits detention of
18 removable aliens beyond the 90-day removal period, does not permit indefinite detention.³ 533
19 U.S. at 689-697 ("if Congress had meant to authorize long-term detention of unremovable aliens,
20 it certainly could have spoken in clearer terms."). The Court explained that "once removal is no
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22 ¹See The Most Frequently Asked Questions of the U.S. Court of Appeals for the Ninth Circuit
23 (Oct. 1, 2006), [http://www.ca9.uscourts.gov/ca9/Documents.nsf/519a025470af2daf88256406008016b7/c2d588851a79dc2f8825679200709f20/\\$FILE/faq2006.pdf](http://www.ca9.uscourts.gov/ca9/Documents.nsf/519a025470af2daf88256406008016b7/c2d588851a79dc2f8825679200709f20/$FILE/faq2006.pdf).

24 ²Respondents' answering brief is due March 14, 2007, and the reply brief is due 14 days later.
25 Prieto-Romero v. Gonzales, No. 05-75747 (9th Cir. Nov. 14, 2006).

26 ³INA § 241 provides that an alien may be detained beyond the 90-day removal period if the
27 Government determines the alien "to be a risk to the community or unlikely to comply with the order of
28 removal." INA § 241(a)(6).

1 longer reasonably foreseeable, continued detention is no longer authorized by statute.” Id. at
2 699. It further held that detention remains presumptively reasonable for sixth months. Id. at
3 701.

4 Petitioner argues that he should be released on bail because his removal is not reasonably
5 foreseeable. He has been detained beyond the presumptively reasonable six-month period, and
6 the Ninth Circuit proceedings will continue for at least another twelve to twenty-four months,
7 after which his case may be remanded to the BIA for further proceedings. He also argues that
8 his petition for review raises a “substantial claim,” and if successful in the Ninth Circuit, his
9 removal will never occur. However, as the Government points out, if the Ninth Circuit rules
10 against petitioner, he is immediately removable to Mexico.

11 Petitioner relies on two recent Ninth Circuit decisions for the proposition that prolonged
12 detention pending appeal can amount to indefinite detention under Zadvydas. In Nadarajah v.
13 Gonzales, 443 F.3d 1069, 1080 (9th Cir. 2006), the Ninth Circuit found the five-year detention
14 of a refugee whose case was pending before the Attorney General to be unreasonable. Similarly,
15 in Tijani v. Willis, 430 F.3d 1241, 1242 (9th Cir. 2005), the court ordered an Immigration Judge
16 to release the petitioner on bail unless the Government could prove he was a flight risk or a
17 danger to the community where he had been detained pending appeal for two years and eight
18 months under INA § 236(c).⁴

19 The Court acknowledges that petitioner’s detention has been lengthy. However, unlike
20 Nadarajah, the length of his detention is not due to the Attorney General’s significant delay, but
21 rather to a judicial process that takes time. Additionally, unlike Tijani, petitioner is not being
22 held under INA § 236(c), and he received two bond hearings before an Immigration Judge.
23 More importantly, unlike Zadvydas, petitioner’s detention has a definite end-point. When the
24 Ninth Circuit decides his case he will most likely be released or removed. If his case is
25 remanded to the BIA, he can seek relief at that time if appropriate. For these reasons the Court

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27 ⁴Unlike section 236(a) under which petitioner is detained, section 236(c) is not discretionary, and
28 requires mandatory detention.

1 finds that petitioner's detention is not indefinite. This conclusion is consistent with Judge
2 Martinez's decision in Beqir v. A. Neil Clark, No. CV-05-01587-RSM (W.D. Wash. June 6,
3 2006), affirmed by No. 06-35590, 2007 WL 201108 (9th Cir. 2007) (unpublished); see also
4 Soberanes v. Comfort, 388 F.3d 1305, 1311 (10th Cir. 2004) ("detention is clearly neither
5 indefinite nor potentially permanent ... it is, rather, directly associated with a judicial review
6 process that has a definite and evidently impending termination point ...").

7 Turning to petitioner's constitutional challenge, the Court finds that petitioner was not
8 afforded adequate Due Process at his prior bond hearings. Pursuant to INA § 236(a), the
9 Government has discretion to decide whether an alien should be detained, released on bond, or
10 released on conditional parole upon a finding of flight risk and danger to the community.
11 Factors to be considered include: (1) the nature and number of disciplinary infractions received
12 while incarcerated or detained; (2) the nature and severity of criminal convictions, sentences
13 imposed, parole history, recidivism, and other criminal history; (3) psychiatric and psychological
14 reports; (4) evidence of rehabilitation; (5) favorable factors including ties to the United States;
15 (6) prior immigration violations; (7) flight risk, including history of escapes and failures to
16 appear; and (8) other information that is probative of whether the alien is likely to endanger the
17 community or violate his or her release conditions. 8 C.F.R § 241.4(f). This Court has
18 previously concluded that Due Process requires an immigration judge to "actually consider"
19 these factors "and explain how they apply to each petitioner's unique circumstances." Phan v.
20 Reno, 56 F. Supp. 2d 1149, 1157 (W.D. Wash. 1999).

21 There is no indication that the IJ considered all the relevant factors when denying
22 petitioner's release, and the IJ did not explain to petitioner how each factor applied to his case.
23 Rather, the IJ denied release based on his determination that petitioner "is appropriately charged
24 as an aggravated felon and he is not eligible for relief and as such constitutes a flight risk." ® &
25 R at p. 11). Because the IJ did not consider all the relevant factors provided in 8 C.F.R §
26 241.4(f), the Court finds that petitioner did not receive adequate procedural protections at his
27 prior bond hearings.

1 The Court therefore concludes that petitioner's case should be remanded to an
2 Immigration Judge to make an individualized determination within 90 days whether the
3 petitioner poses a flight risk or a danger to the community.⁵ The Court instructs the IJ,
4 consistent with Phan v. Reno, to consider all the factors relevant to discretionary detention under
5 INA § 236(a), and to explain how these factors apply to Prieto-Romero's case. The IJ may not
6 simply conclude that petitioner is a flight risk based on his prior conviction. Consistent with 8
7 C.F.R § 241.4(d)(1), petitioner will bear the burden of proof at the hearing.

8 IV. Conclusion

9 For the foregoing reasons, the Court DENIES respondents' motion to dismiss. The Court
10 REMANDS petitioner's case to the Immigration Judge to make an individualized determination
11 as to whether petitioner is a flight risk or a danger to the community. The parties shall file a
12 joint status report with the Court within 90 days of the date of this order explaining what action
13 has been taken and its outcome. The joint status report shall also include a copy of the written
14 decision issued by the IJ.

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16 DATED this 16th day of February, 2007.

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19 Robert S. Lasnik
20 United States District Judge
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26 ⁵The Court acknowledges that this review may coincide with ICE's annual file review. If the IJ
27 releases petitioner, ICE's file review shall not be necessary. Likewise, if ICE releases petitioner before
28 the IJ hearing, the hearing shall not be necessary.